

IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE
S.O. 1981 c. 53, AS AMENDED

AND IN THE MATTER OF the complaint made by Thomas Geiger and the complaint made by Bob Barboutsis alleging discrimination in employment contrary to Sections 4(1) and 8 of the Ontario Human Rights Code, S.O. 1981 c.53, as amended

AGAINST

London Monenco Consultants Limited, its servants and agents, and Mr. T.F. Roger, Project Manager, 1 St. Paul Street, St. Catharines, Ontario.

BOARD OF INQUIRY

PROFESSOR IAN A. HUNTER

APPEARANCES:

FOR THE COMPLAINANTS: Mr. Walter E. Telfer, Counsel

FOR THE ONTARIO HUMAN
RIGHTS COMMISSION: Ms. Lianne Brossard
Ms. Catherine Osborne

FOR THE RESPONDENTS: Mr. John Broderick

(B) THE FACTS

What is at issue is a document of London Monenco Consultants Limited called: Conditions of Field Assignment for Staff on Permanent Assignment Procedure 27 (hereinafter Procedure 27). The document was dated August 11, 1982 and was signed by the Procedure Administrator, Mr. Turner-Bone.

The relevant provisions of Procedure 27 are as follows:

"5.2.1 Married Status:

(a) An employee, who relocates one or more of his dependants from his home base and takes up residence in the town of Atikokan, qualifies for a living allowance of \$850.00 per month, or

(b) An employee, who elects not to relocate his family from his home base and takes up his assignment in Atikokan, shall be considered 'single status' and will receive the allowances and expenses designated in 5.2.2 and as follows:

- (i) The employee shall not receive any relocation allowance.
- (ii) The employee shall be reimbursed his actual travel expenses for each return trip to his home base once every three weeks subject to site management approval.
- (iii) The employee, transferred from the Thunder Bay Project, who retains his residence in Thunder Bay, shall be reimbursed his actual travel expenses to and from Thunder Bay subject to site management approval. Travel expenses shall be calculated on a distance basis, assuming car travel from his residence in Thunder Bay.

5.2.2 Single Status:

The employee is expected to take up residence in the Atikokan construction camp, and as such does not qualify for a living allowance while in that residence.

Should the employee choose to establish residence other than in the camp, a living allowance of \$350.00 per month will be paid, subject to management approval.

Abraham. On July 14, 1982, he signed a document (Exhibit 6) acknowledging that his employment at the Atikokan job site would be governed by Procedure 27. His viva voce evidence left me in no doubt that he understood and accepted the terms and conditions set out in Procedure 27:

EXAMINATION-IN-CHIEF

"Q. Mr. Geiger, by this letter, did you accept the terms and conditions of service as set out therein?

A. Yes, I did.

Q. What are those terms and conditions?

A. Those terms and conditions are the ones detailed in Procedure 27, with regards to conditions at the camp.

Q. Now, on July 14, 1982, you agreed to this procedure?

A. Yes, I did.

Q. Why would you have agreed to that procedure?

A. That was part of my continued terms, terms of employment with the Company. In order to continue working on the project, I had to sign those terms and conditions.

Q. Where did you reside during the Atikokan assignment?

A. I resided in the camp.

Q. Why did you live in the camp?

A. That was the recommended location for us, for single people to stay.

Q. What was your marital status during the assignment to Atikokan?

A. Single.

Q. Did you have any dependants at that time?

A. No, I did not." (Transcript, Vol. 1, p. 29-30; 31-32)

the Atikokan Project. At the peak period, the Monenco companies had approximately 100 people on site at Atikokan; the total complement of site workers (including Ontario Hydro employees, Acres Shawinigan, another contractor, and casual labourers) was approximately 1,000. Mr. Turner-Bone testified that, at the beginning of the project, Ontario Hydro wanted all personnel to either live on site (ie. in the trailer accommodation provided) or to relocate to Atikokan. However, it proved difficult for London Monenco to recruit the personnel it needed to do the job which it had contracted to do. Engineers, and particularly married senior personnel with families, were reluctant to uproot their families and to move to Atikokan for a project whose duration was uncertain. Many were equally reluctant to abandon their families at "home base" and to go and live for extended periods at a remote, relatively deprived job site. Consequently, the provision of Company-paid return flights every three weeks evolved as an inducement to get married personnel, whose skills were vital to the success of the project, to agree to go to Atikokan. Mr. Turner-Bone testified:

"As we went along further in the project we found there were short-term assignments, and that it was not equitable to have a married person relocate, as the policy generally called for. Sell their homes in St. Catharines and Niagara Falls, and move their family up to Atikokan, if the period was only for a nine-month or a year period. So this provision was put into the conditions so that we could have the services of the people who were required to do specific functions, that were probably more short-term and not dislocate their families and cause a lot of upset. So that provision was made so that they could go and live as single status and have some benefit to be able to get back to their families, who would be living back in St. Catharines or Niagara Falls.

Q. From your experience abroad, if you have married people, is there any philosophy, or any particular reason why you would fly, or permit married people to leave the sites of this kind, and take them to their dependants? What considerations would management take? What factors

(C) THE CODE

The relevant provisions of the Ontario Human Rights Code are:

"4(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

9(c) 'Equal' means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination.

9(g) 'Marital status' means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

23 The right under section 4 to equal treatment with respect to employment is not infringed where,

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status, if the age, sex, record of offences or marital status of the applicant is a reasonable and bona fide qualification because of the nature of the employment."

(D) THE ISSUE

The Company contends that the discrimination between married and single employees at the Atikokan job site, by the provision of a different relocation allowance and Company-paid return flights to married employees, was "a reasonable and bona fide qualification because of the nature of the employment" in question.

made no significant structural alterations to the bunkhouses so that any female employee would be required to share toilet and shower facilities with male residents. When a female employee, who had applied for and accepted the accommodation without prior inspection, filed a complaint alleging sex discrimination, the Company's defense was that it had complied literally with the Order of the Human Rights Commission: it had made camp accommodation available to female employees on the same terms and conditions as male employees. The Board of Inquiry held that discrimination may result from strict equality as well as inequality, and that the spirit of human rights legislation may be circumvented although the letter is fulfilled:

"It was contended that there can be no discrimination where everyone receives identical treatment. We reject that contention. It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination. We would add only that the circumstances of this complaint graphically illustrate the truth of this important notion."

The provision of Company-paid travel to home base for married employees every three weeks is more troublesome.

The leading case on the interpretation of an exemption clause like section 23(b) arose under the predecessor Code (R.S.O. 1980 c. 340) in Ontario Human Rights Commission v. Borough of Etobicoke, (1982) 132 D.L.R. (3rd) 14 (S.C.C.). The prohibitions on discrimination in employment did not apply where the prohibited ground (in that case, age) was "a bona fide occupational qualification and requirement for the position or employment". For the Supreme Court of Canada, McIntyre J. enunciated a two-fold test for applying the exemption: (1) "To be a bona fide occupational qualification and requirement a limitation, such as mandatory retirement at a fixed age, must be

return flight provision from Atikokan to home base. Nevertheless, none of Mr. Turner-Bone's, perhaps impressionistic, conclusions were refuted by evidence from the Commission, who bear the ultimate onus of proof. I draw comfort from McIntyre J.'s comment: "It would be unwise to attempt to lay down any fixed rule governing the nature and sufficiency of the evidence required [ie. to justify mandatory retirement at age 60]....In the final analysis, the Board of Inquiry, subject always to the rights of appeal under section 14(d) of the Code, must be the judge of such matters." Applying my best consideration to Mr. Turner-Bone's evidence, although it is somewhat impressionistic, I am satisfied that the provision of flights for married employees was objectively related to the employment at Atikokan, and that it was reasonably necessary to the discharge by London Monenco of its subcontractor's obligations in an efficient and economical way.

In the Etiobicoke case, the discriminatory provision (mandatory retirement at age 60) was embodied in a Collective Agreement. It might be contended there that the Union had "bargained away" the fundamental statutory human rights of individual members not to be discriminated against. The individual complainants there wished to exercise their statutory rights to continue in employment without discrimination because of age. In the instant case, no union is interposed between the Complainants and the employer. Both Complainants understood and accepted the terms of employment, which did not include a Company-paid return flight home every three weeks. The Company provided this to married employees to recruit them to go up to Atikokan, but the two single Complainants freely accepted to go to Atikokan without that perquisite. Geiger and Barboutsis got exactly the employment contract they bargained for and agreed to. At the time that contract was made no part of it

circumstances, been allowed to counteract the sweeping protections provided in Part 1 of the Code" (Human Rights in Ontario, Carswell 1983, p. 180).

On the evidence before me, I am satisfied that the realities of the workplace required the Company to make special provision in order that married employees could overcome the additional disadvantage of being separated from their families. They did so in a way which, at first blush, seems inconsistent with section 4(1) of the Code. However, I am satisfied that the discrimination in employment for reasons of marital status, which occurred in this case, was reasonable and bona fide given the nature of the particular employment involved. I find the employer's defence, pursuant to section 23(b) of the Code, compelling.

Accordingly, both complaints are dismissed.

DATED at the City of London, in the County of Middlesex this 22nd day of January, 1987.

Ian A. Hunter

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Board of Inquiry